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July 31, 2003

Chairman Minan and Board Members
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Response to Complaint No. R9-2003-0162 (Pioneer Builders)

Dear Chairman Minan and Members of the Regional Board:

INTRODUCTION

I represent Pioneer Builders on this matter. Clean-up and Abatement Order R9-2003-0158 (the "CAO") and the above-referenced Administrative Civil Liability Complaint (the "ACL Complaint") both relate to Pioneer's two-acre construction site in the City of Dana Point. We appreciate the Board's recent modifications to the CAO, and we are working to implement the CAO as modified. We are also working on plans to create 0.33 acres of additional wetlands off-site as a component of the project. We strongly disagree with the staff proposal to impose fines totaling $139,800 on this eight-home project.

We met with members of the Board's staff to try to understand the nature of the charges made in the ACL Complaint. We were told that normally the decision to prepare an ACL complaint is made by the Compliance Enforcement Unit, but in this instance the Board ordered issuance of the ACL Complaint. Consequently, in contrast to normal procedures, any proposal to modify or settle the charges in the ACL Complaint (by funding a Supplemental Environmental Project, for example) would only be considered by the Board. To our knowledge, the Board did not direct staff to prepare an ACL complaint against Pioneer, and we are concerned that this project is being singled out for different treatment from other, similarly situated projects.

We regret how events have unfolded and acknowledge that communication with staff from the Board should have been better from the outset. However, as discussed below, we respectfully submit that the ACL Complaint against Pioneer contains alleged violations and proposed fines that are unprecedented, unwarranted and excessive under the circumstances.

RESPONSE TO ALLEGATIONS

I. Response to Alleged Violation No. 1.

A. Nature of the Allegation.

Alleged Violation No.1 of the ACL Complaint relates to the elimination of the storm water drainage swale that existed on the site prior to grading and construction activities. In the Technical Analysis, at page 3, staff asserts that these construction activities "impacted the ability of the creek to support water quality functions impacting beneficial uses."

B. Pioneer's Impact to Drainage Feature is Addressed in CAO and in Section 401, 404 and 1603 Processes; Additional Penalties Are Not Warranted Under the Circumstances.

Our primary objection to Violation No.1 is that it relates to the activity that is being specifically addressed under the CAO and the "after-the fact" Section 401, 404 and 1603 authorizations. Under the CAO and pursuant to the anticipated 401/404/1603 requirements, the project is creating a higher quality wetland on-site than existed previously (it will be the same size and use the same water as the feature impacted but will have all native as opposed to non-native vegetation) and creating five-times more wetlands than were impacted on-site in an area that will have long-term conservation value for wildlife. A 5:1 or 6:1 mitigation ratio is well in excess of what the Regional Board, Army Corps of Engineers and Department of Fish and Game would typically impose on a project impacting 0.066 of an acre of wetlands fed by nuisance runoff and entirely surrounded by urban development; *this mitigation ratio is meant to be punitive.* To then impose an additional penalty under the circumstances of this case would be excessively punitive.

The Board has processed many after-the fact 401 certifications previously, but the Board has *never* imposed an ongoing daily fine for the lost benefit of the feature impacted. There certainly could be projects where the imposition of a fine in addition to a "punitive" mitigation ratio might be warranted; namely, where there is egregious conduct, substantial environmental degradation and the alleged violator has been warned that failure to restore the impacted feature could result in daily penalties adding up to tens or even hundreds of thousands of dollars. However, this incident does not satisfy any of these criteria.

1. Pioneer's Conduct. Pioneer's very experienced environmental consultant investigated site conditions and concluded that the nuisance-fed swale was an artificial ditch constructed in an upland area, and as such was not a jurisdictional feature. Pioneer has subsequently agreed, for purposes of resolving the matter, to treat the drainage feature as falling within the Corps of Engineers' jurisdiction. However, we respectfully submit that the true nature and jurisdictional status of the drainage swale is far from clear, and Pioneer had no reason to question its consultant's determination that authorizations were not needed prior to impacting it. Thus Pioneer's impacting the drainage swale without obtaining authorizations it did not know were needed did not constitute egregious conduct.

Even the Corps personnel who visited the site did not immediately come to the conclusion that the feature was within the Corps' jurisdiction. Only after conferring with their supervisors, reviewing a site-specific geology report provided by Pioneer and examining old aerial photographs did they conclude that the feature was a relict portion of a natural drainage and that, despite the fact that the drainage had been eliminated entirely upstream and downstream of this site, it was still sufficiently connected to a navigable water of the U.S. (the Pacific Ocean) via the storm drain system to remain subject to the Corps' jurisdiction (see Corps' e-mail to Pioneer dated February 3, 2003, attached as Exhibit 1).

This determination could have been contested on both factual and legal grounds in that: (1) There is evidence indicating that there was not a historical natural drainage feature in the location of the drainage swale (the historical ephemeral drainage appears to have been located to the east and filled in connection with earlier development). If this evidence is correct, then the consultant hired by Pioneer properly determined that the feature was a drainage ditch constructed in uplands, which the Corps does not regulate (see attached Exhibit 2); and (2) There are a large number of ongoing federal cases grappling with the question of when a wetland or tributary is sufficiently connected to "navigable waters" to lie within the Corps' jurisdiction. Thus, even assuming the wetlands at issue formed over the last 20+ years within and adjacent to what was previously an ephemeral drainage (and not in what was previously all uplands), it is an open legal question whether the Corps, after the Supreme Court's decision in SWANCC, has jurisdiction over wetlands adjacent to or within relict portions of drainages that are only connected to navigable waters through an underground storm drain system (see attached Federal Register publication of a Corps and EPA memorandum discussing this subject, Exhibit 3).

Again, in order to resolve this matter, Pioneer has agreed to obtain 404, 401 and 1603 authorizations (whether legally required or not) and to provide mitigation at a ratio that is substantially higher than what would have been required had the authorizations been obtained prior to impacts. However, Pioneer believed its actions were proper at the time it commenced project construction, and it had a reasonable basis for this belief. Therefore, its actions do not qualify as the type of egregious conduct warranting a $66,000 fine.

2. Environmental Consequences of Pioneer's Actions. The Board's own staff acknowledged that the drainage swale was "degraded prior to impacts" such that it "likely exhibited low biochemical and habitat-water-quality related functions." (Page 8 of the Technical Report in support of the CAO). Even neighboring homeowners were originally only concerned that "after 22 years of urban runoff from this open storm drain, toxic chemicals could have reached the water table." (See Ms. Pam Tappan correspondence, attached as Exhibit 4). Ms. Tappan wrote to the San Clemente Public Works Director to say that the storm drain outlet "has been letting urban runoff and who knows what else dump onto private property for over 22 years. . . I would like you to personally come out here and look at the oily film on the water and all the trash and tell me there is no problem." (Exhibit 4). When seeking intervention by the State Water Resources Control Board, Ms. Tappan apparently pointed out that the "standing water has dead birds/animals, [an] oily sheen, trash and junk on occasion." (Exhibit 4). Only later did Ms. Tappan start characterizing the wetland as "a critical part of our local eco-system."

In contrast to the impacted swale, the wetland Pioneer is creating on-site will have all native species and will be maintained so that trash and junk will not accumulate. It will be the same size as the impacted drainage swale and will be fed by the same nuisance and storm runoff. The runoff that is not absorbed by the wetland's soils and plants will now flow into a CDS unit installed as part of the project before entering the larger storm drain system. In addition, five-times more wetland habitat is going to be created in an area with long-term biological conservation value. Pioneer submits that the degraded and limited function of the wetland swale impacted, the steps the project is taking to recreate native wetlands on and off-site, and the steps the project is taking to treat previously untreated urban runoff are additional factors that weigh against the imposition of the fine recommended by staff.

3. No Notice Regarding Potential for Ongoing Fine. After the Corps asserted jurisdiction, I was asked to advise Pioneer. While I viewed the issue as factually and legally complex, I recommended that Pioneer agree to process after-the-fact authorizations with the Corps, Regional Board and the Department of Fish & Game, and Pioneer moved in good faith toward such a resolution (See e-mail correspondence regarding after the fact processing, attempts to locate mitigation opportunities, etc., attached as Exhibit 5). Thus we were surprised by the issuance of the original CAO, which envisioned restoration of the prior drainage swale in the exact location and elevation where it previously was situated, and we are equally surprised by the staff proposal under alleged Violation No.1 to impose a fine of $1,500 a day for 46 days, or a total penalty of $66,000. There was simply no indication whatsoever that potential penalties could be mounting as we tried to prepare a plan for on-site wetland creation and locate a suitable site for off-site wetland creation. Had we been given any indication that this was a possibility, my analysis regarding whether to contest the assertion of jurisdiction over the drainage swale would have been different. Every indication was that we were moving toward a resolution that did not involve the imposition of daily penalties, and it would not be fair to change course and now impose penalties on a "look back" basis.

4. Economic Benefit. Ms. Tappan has asserted that Pioneer has obtained a substantial economic benefit by impacting the drainage swale prior to obtaining 401 certification from the Board. Not so. In fact, Pioneer has suffered financially for its actions because Pioneer is now required to provide mitigation at a substantially higher ratio than if it had processed the 401 certification in advance. Admittedly, this presumes that the impacts that occurred would have been authorized if 401 certification had been sought in advance of impacts. However, a candid assessment by the Board's staff would acknowledge this to be the case, for the same reasons the Board itself agreed to modify the CAO (limited function of the impacted swale and the infeasibility of avoidance). My personal experience in obtaining 401 certifications for many other residential developments and my review of the various certifications posted monthly on the Board's website further support the assertion that a prior-to-impacts 401 certification would have been obtained, with considerably less mitigation.

There are even indications in the record that the on-site wetland component, which only the Board is requiring of the project, would not have been required had 401 certification been sought in advance. (See correspondence from Bob Morris of the Board's staff contemplating whether or not to include the on-site wetland as part of the 401 certification's requirements, attached as Exhibit 6). This on-site wetland component is being implemented at a

cost of approximately $ 39,500. While the land acquisition cost of the off-site restoration component is uncertain at this point (and could be very expensive), just the planting, temporary irrigation and five-year minimum maintenance and monitoring for the off-site restoration is anticipated to cost approximately $ 40,000. A lower mitigation ratio would have lowered this cost and any land acquisition cost. Thus there is no basis for asserting that Pioneer has enjoyed a windfall as a result of its actions. Transaction costs, including lawyer's fees, are also substantially higher than they would have been.

II. Response to Alleged Violation No. 2.

A. Nature of the Allegation.

Alleged Violation No.2 in the ACL Complaint is that from March 10, 2003 forward the project was subject to State requirements to have adequate sediment and erosion control best management practices pursuant to a SWPPP, but the project's BMPs were allegedly inadequate through April 15, 2003.

B. The Record Evidence Does Not Support Claim that Inadequacies Were of a Severity and Scope to Warrant Proposed Fine or that the Problems Persisted Through April 15, 2003.

Pioneer was aware that as of March 10, 2003 it would be subject to the Statewide permit. Pioneer therefore prepared a SWPPP and submitted it to the City of Dana Point well in advance of this deadline (See Exhibit 7). The project also had a variety of erosion and sediment control measures in place well in advance of March 10th. Indeed, as documented in the City of Dana Point's letter to the Board dated May 8, 2003, a variety of BMPs were discussed at the pre-construction meeting on the project, and these were implemented during project construction (Exhibit 7). Each and every time the City's enforcement officers have suggested ways to reinforce the project's BMPs to protect against releases of sediment, Pioneer implemented the suggestions. On March 15, 2003, southern California experienced a 10-year storm event, and the BMPs in place admittedly were not able to deal with this storm adequately. The project supervisor was on-site during the storm event to take corrective measures as quickly as possible. While Pioneer sincerely regrets this incident, Pioneer's deficiencies in erosion control and the resulting impacts were much less than those incidents for which the Compliance Enforcement Unit has previously prepared ACL complaints, and staff is recommending a fine for this two-acre site that is similar to what the Board has imposed on two hundred acre sites. We submit that this is excessive.

Moreover, the last inspection of the site by a member of the Board's staff was on March 24, 2003. This staff member documented that BMPs were in place, but he expressed some concerns that were immediately addressed (see e-mail correspondence from Board staff and follow-up responses, attached as Exhibit 7). The photographs taken during that March inspection show a project that, while not perfect, was clearly implementing a number of BMPs, and there is nothing to indicate that Pioneer failed to implement adequate sediment and erosion control measures after March 24, 2003. Nevertheless, staff has proposed a daily penalty of $1,000 for each day through April 15, 2003.

This is not a situation where erosion control was ignored altogether or where Pioneer ignored notices to correct deficiencies. While the BMPs were not able to prevent some sediment-laden runoff from leaving the site (and a smaller amount to actually enter the storm drain system), they were not severe discharges (because some measures were in place and the site is relatively small and flat). Moreover, efforts were immediately taken to correct deficiencies. By the last week in March, BMPs had been sufficiently reinforced that the potential for sediment releases had been substantially alleviated, and Board staff did not notify Pioneer that any other measures should have been implemented (see April 4, 2003 e-mail included in Exhibit 7, where Board's inspector thanks Pioneer for "response to BMP concerns"). Under these circumstances, we respectfully submit that the proposed fine of $1,000 per day for 36 days is unwarranted and should be eliminated or dramatically reduced.

III. Response to Alleged Violation No. 3.

A. Nature of the Allegation.

Alleged Violation No.3 involves a charge that the CAO requirement to submit a complete 401 certification application by April 18, 2003 was violated because the 401 certification application, while submitted timely, was purportedly incomplete.

B. Alleged Violation No. 3 is Without Any Merit and Would Not Warrant Imposition of the Proposed $36,000 Fine Even Were it Meritorious.

Alleged Violation No. 3 and its proposed $36,000.00 fine are baffling. Pioneer submitted a 401 application on April 18, 2003, as required. While the Board's staff sent form a letter in May that checked off three items needed to make the application complete, in fact two of the items (a copy of the 404 permit application and evidence of CEQA compliance) were already included with the original submittal (see attached Exhibit 8). The third requested item (a copy of the Section 1603 notification) was provided after the Board requested it, but it is not legally required to make an application for 401 certification complete. Thus, the CAO requirement had in fact been met. However, even if the application had been technically incomplete, it is simply ludicrous to assert that such a deficiency warrants a $33,000 fine. Pioneer was not attempting to defy the CAO or stonewall the staff in any way, and there is no justification for including alleged Violation No.2 in the ACL Complaint at all.

Note also that the Board did not inform Pioneer of the purported deficiencies in the application until well into May. In effect, staff proposes a $1,000 per day fine even for the period during which Pioneer was waiting to see if its application had everything the Board's staff needed to process it. This alleged violation and proposed fine is completely unwarranted.

IV. Response to Alleged Violation No. 4.

A. Nature of the Allegation.

Allegation No.4 involves the State Water Resources Control Board's untimely receipt of Pioneer's Notice of Intent (NOI) for coverage under the State storm water permit for construction sites exceeding one acre.

B. Pioneer Attempted to Comply in Timely Manner with NOI Filing Requirement and Proposed Penalty is Unwarranted and Excessive.

There is no dispute that Pioneer had a SWPPP prepared well in advance of March 10, 2003, nor does Pioneer dispute that it was well aware of the requirement to file an NOI by March 10, 2003. Pioneer attempted to comply with this requirement by filling out the NOI form and mailing it to the State Board's P.O. Box (See signed NOI dated March 8, 2003 and signed proof of service by mail, attached as Exhibit 9). Apparently the P.O. Box was the wrong address to send the NOI, and the first NOI was never processed by the State Board or returned to Pioneer. Pioneer then filled out a second NOI form and mailed it (Registered Mail) to the State Board's street address on April 10, 2003.

Under the circumstances, Pioneer does not believe a penalty of $150 per day for 32 days, or a total fine of $4,800, is justified. In this regard, Pioneer would also note that ACL Complaint No. R9-2003-0162 proposes a fine against Ryland Homes for failing to file an NOI of $50 per day for 191 days (one third the daily amount for allegedly being six times more tardy).

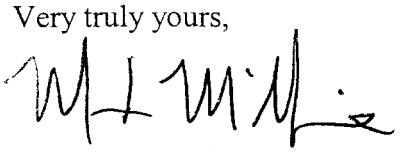
CONCLUSION

The proposed penalties in the ACL Complaint are not appropriate under the circumstances. The first alleged violation and proposed penalty (by far the largest proposed penalty) is clearly intended to punish Pioneer above and beyond the punishment associated with the after-the-fact authorizations and CAO. However, Pioneer's actions were taken in good faith, the impacts were minimal and the Board's staff never indicated that penalties could be mounting as Pioneer worked with the agencies to arrive at an after-the-fact resolution of the incident. The proposed penalties associated with alleged Violations Nos. 2 and 4 are excessive compared to assessments proposed in connection with other ACL Complaints (and compared to numerous projects that have had similar violations and no proposed ACL assessments at all). Finally, alleged Violation No. 3 lacks any merit whatsoever, and would not warrant a penalty in any event.

Pioneer respectfully requests that the Board dismiss the ACL Complaint entirely. At the very least, the alleged Violation No.1 and alleged Violation No.3 should be dismissed entirely and the proposed assessments under alleged Violation No. 2 and alleged Violation No. 4 should be reduced dramatically.

Thank you for consideration of this response to the ACL Complaint.

Very truly yours,



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Cc: Rebecca Stewart, Regional Board
Terry Hirchag, Pioneer Builders
Paul Douglas, Pioneer Builders